

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**CITY OF HURRICANE, WEST VIRGINIA;
and THE COUNTY COMMISSION OF
PUTNAM COUNTY, WEST VIRGINIA;**

Plaintiffs,

v. Civil Action No. 3:14-cv-15850

**DISPOSAL SERVICE, INCORPORATED, a
West Virginia corporation; and WASTE
MANAGEMENT OF WEST VIRGINIA,
INCORPORATED, a Delaware corporation,**

Defendants.

**DEFENDANTS' SUPPLEMENTAL REPLY MEMORANDUM
REGARDING U.S. EPA'S DETERMINATION OF MCHM**

Defendants Disposal Service, Incorporated (“DSI”) and Waste Management of West Virginia, Incorporated (“Waste Management”) submit this Supplemental Reply Memorandum as directed by this Court’s Order entered June 30. Defendants will address the weight which the Court should give to the June 20, 2014, letter from the United States Environmental Protection Agency (“EPA”) to the West Virginia Department of Environmental Protection (“DEP”) and the importance of the letter (“EPA letter”) to the Defendants’ pending Motion to Dismiss.

In short, Defendants submit that the EPA letter corroborates the arguments made by the Defendants—namely, that Crude MCHM is not a hazardous waste regulated by the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et seq.*

As explained previously,¹ the only issue before the Court is whether Plaintiffs qualify for the statutory exemption from the ninety (90) day notice requirement of RCRA, which requires that the Plaintiffs establish that their citizens suit under 42 U.S.C. § 6972(a)(1)(B) is “an action . . . respecting a violation of subchapter III” of RCRA. To establish a violation of subchapter III, Plaintiffs must show that Crude MCHM is a hazardous waste regulated by RCRA.

At the outset, Defendants believe that the EPA letter needs to be examined to determine the weight the Court should accord it. The letter was authored by John A. Armstead, the Director of the Land and Chemical Division of EPA’s Region III. The Land and Chemical Division administers, *inter alia*, environmental statutes that protect the air, water, and land environments, as well as the public’s right-to-know about hazardous chemicals in their community.² The recipient of the letter was Scott Mandirola, the Director of the Division of Water and Waste Management of DEP. The mission of the Division of Water and Waste Management is to preserve, protect, and enhance West Virginia’s watersheds for the benefit and safety of all of its citizens through implementation of programs controlling hazardous waste, solid waste and surface and groundwater pollution, from any source.³ Among other things, the Division of Water and Waste Management is responsible for permitting solid waste and hazardous waste facilities.⁴ In this regard, Director Mandirola signed and granted the Minor Permit Modifications for Disposal of Special Waste dated February 12, 2014, which are attached to the Defendants’ Motion to Dismiss as Exhibit 1.

¹ See Defendants’ Reply to Governmental Plaintiffs Opposition to Defendants’ Motion to Dismiss (“Defendants’ Reply”), Doc. No. 12, at p. 1; Defendants’ Motion for Leave to Permit Consideration of U.S. EPA’s Determination of MCHM Upon Defendants’ Motion to Dismiss (“Defendants’ Motion for Leave”), Doc. No. 13, at ¶ 1.

² See United States Environmental Protection Agency, Organization Chart for EPA’s Region III Office, *available at* <http://www2.epa.gov/aboutepa/organization-chart-epas-region-3-office> (last visited July 2, 2014).

³ See West Virginia Department of Environmental Protection, Waste and Water Home, *available at* <http://www.dep.wv.gov/WWE/Pages/default.aspx> (last visited July 2, 2014).

⁴ DEP has been authorized by EPA to administer its own hazardous waste program. See Defendants’ Reply, at p. 4.

Turning to the content of the EPA letter, Director Armstead succinctly explains that “EPA does not consider Crude MCHM to be a hazardous waste regulated by RCRA when discarded.” Director Armstead explains that when a chemical product such as MCHM leaks from a storage tank onto the ground, or is otherwise discarded, it becomes a solid waste; however, the Crude MCHM that was spilled at the Freedom facility “was not a hazardous waste because Crude MCHM is not a listed waste under Subpart D of Part 261” (of 40 C.F.R.). This is precisely what the Defendants have argued—that Crude MCHM is not a listed hazardous waste. *See* Defendants’ Memorandum in Support of Their Motion to Dismiss (“Defendants’ Memorandum”), Doc. No. 7, at pp. 8–9. Director Armstead then explains that solid wastes are defined as hazardous by EPA “if they exhibit one of four characteristics described in Subpart C of 40 C.F.R. Part 261 . . .”; he next states that the Crude MCHM spilled at the Freedom facility was not a hazardous waste because it is not “a characteristic waste under Subpart C of Part 261.” Again, this is exactly the argument made by the Defendants in their Memorandum. *See* Defendants’ Memorandum, at pp. 9–10. Finally, Director Armstead explains that when the Crude MCHM was mixed with debris or waste water, it would become a “regulated hazardous waste only if such debris and/or waste water themselves met the regulatory definition of hazardous waste.” Defendants’ Memorandum also addressed EPA’s “mixture rule.” *See* Defendants’ Memorandum, at pp. 11–13.

Thus, as noted above, the EPA letter confirms the arguments advanced by Defendants that Crude MCHM is not a hazardous waste. Defendants do not suggest that the EPA letter is the product of rulemaking or otherwise a final agency action on the part of EPA. Rather, Defendants

submit that the EPA letter reflects a straightforward application of EPA's regulations under RCRA.⁵

As such, the EPA letter reflects EPA's "interpretation of its own regulations." Accordingly, this Court's review is limited to assessing the reasonableness of that interpretation. *Ohio Valley v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009). In *Ohio Valley*, the Fourth Circuit held that

[t]his kind of review is highly deferential, with the agency's interpretation "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.2d 425, 439 (4th Cir. 2003) (noting that, when reviewing an agency's interpretation of its own regulation, "[t]he reviewing court does not have much leeway"). In applying this principle, also known as "*Auer* deference" or "*Seminole Rock* deference," we must first determine whether the regulation itself is unambiguous; if so, its plain language controls. See *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *United States v. Deaton*, 332 F.3d 698, 709 (4th Cir. 2003). If ambiguous, however, *Auer/Seminole Rock* deference is applied. See *Christensen*, 529 U.S. at 588, *Deaton*, 332 F.3d at 709.

556 F.3d at *193–194.

The Plaintiffs have not challenged the regulations in EPA's letter regarding hazardous waste identification as being ambiguous; hence, the *Auer* "plain language controls." If the regulations were challenged as being ambiguous, then the EPA's interpretation as set forth in the EPA letter would be entitled to substantial deference here.

⁵ In addition to confirming Defendants' arguments, the EPA letter also confirms DEP's similar determination set forth in its Minor Permit Modifications for Disposal of Specific Waste (Exhibit 1). While West Virginia is administering its own hazardous waste program, the DEP is required to "be consistent with but no more expansive in coverage nor stringent in effect" than RCRA. W.Va. Code § 22-18-6(a). See Defendants' Reply, at p. 5. Moreover, DEP's own determination is entitled to deference. See *Ohio Valley v. Elk Run Coal Co.*, 2014 WL 2526569 (S.D.W.Va. June 4, 2014).

Therefore, inasmuch as EPA has determined that Crude MCHM is not a hazardous waste as set forth in the EPA letter, EPA's determination is controlling, or at the very minimum, is entitled to substantial deference. Accordingly, in response to the Court's first question, the Defendants respectfully submit that the EPA letter should be accorded substantial weight by the Court.

The second question posed by the Court—the importance of the EPA letter to the Defendants' Motion to Dismiss—poses a somewhat philosophical dichotomy. Before receiving the EPA letter, the Defendants had great confidence in their arguments for dismissing this civil action, founded upon Crude MCHM not being a hazardous waste under RCRA. Viewed from that perspective, the EPA letter is not “important” to the Defendants' Motion to Dismiss. On the other hand, Defendants believe that the EPA letter completely validates their arguments that Crude MCHM is not a hazardous waste under RCRA and, as such, Defendants hope that the Court will find the EPA letter to be highly persuasive. Viewed from this perspective, the EPA letter is quite important to the Defendants' Motion to Dismiss—the letter represents the proverbial “icing on the cake.”

Since Crude MCHM is not a hazardous waste under RCRA, as confirmed by the EPA letter, the Plaintiffs were required to provide the ninety (90) day notice before commencing this civil action; since they failed to do so, their Complaint must be dismissed. The only remaining question is whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim. This question remains because the U.S. Supreme Court in *Hallstrom* did not reach the issue about whether the notice provision is jurisdictional, but emphatically held that the district court must dismiss the action as barred by the terms of the statute. *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, at 31–33. However, the U.S. Court of Appeals for the Fourth

Circuit and other circuits have indicated that the failure to provide notice likewise fails to vest the district court with subject matter jurisdiction .⁶ See Defendants' Memorandum, at p. 14; Defendants' Reply, at p. 2.

CONCLUSION

In its June 20, 2014 letter, the EPA unequivocally advised the DEP that EPA does not consider Crude MCHM to be a hazardous waste regulated by RCRA when discarded. Since the EPA letter reflects a straightforward application of EPA's regulations under RCRA, and is EPA's interpretation of its own regulations, then the EPA letter's characterization of Crude MCHM as a non-hazardous waste should be considered controlling by the Court, or at a minimum given substantial deference, in response to the Court's first question.

The Court also asked the importance of the letter to the Defendants' Motion to Dismiss. Obviously, the letter was not "important" to the Defendants' Motion to Dismiss at the time that the motion was filed, as the letter had not been written. However, having received the EPA letter, Defendants believe that the EPA letter completely validates their arguments that Crude MCHM is not a hazardous waste under RCRA, and that the Court should find that EPA's determination of Crude MCHM is controlling here. Thus, the EPA letter becomes quite important with respect to the Defendant's Motion to Dismiss.

Finally, since Crude MCHM is not a hazardous waste under RCRA, there was no violation of subchapter III of RCRA, and Plaintiffs were required to provide ninety (90) day

⁶ See *Beazer E., Inc. v. U.S. Navy*, 111 F.3d 129 (4th Cir. 1997) (unpublished disposition); but see *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 400 (4th Cir. 2011). See also *Pub. Interest Research Grp. Of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1189 (3d Cir. 1995); *Sierra Club v. Hamilton Cnty. Bd. Of Cnty. Comm'rs*, 504 F.3d 634, 646 (6th Cir. 2007); *Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 800 (9th Cir. 2009).

notice of their citizens suit under 42 U.S.C. § 697 2(a)(1)(B). Having failed to do so, the Complaint must be dismissed.

**DISPOSAL SERVICE, INCORPORATED; and
WASTE MANAGEMENT OF WEST
VIRGINIA, INCORPORATED**

By Counsel

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CERTIFICATE OF SERVICE

I, John C. Palmer IV, counsel for Defendants Disposal Service, Incorporated, a corporation and Waste Management of West Virginia, Incorporated, a corporation, hereby certify that on July 3, 2014 I electronically filed **DEFENDANTS' SUPPLEMENTAL REPLY MEMORANDUM REGARDING U.S. EPA'S DETERMINATION OF MC HENRY** with the Clerk of this Court using the CM/ECF System which will send notification of such filing to the following:

Michael O. Callaghan (WV Bar No. 5509)
Neely & Callaghan
159 Summers Street
Charleston, West Virginia 25301-2134
Counsel for Plaintiffs

and further certify that on July 3, I served the within SUPPLEMENTAL REPLY MEMORANDUM upon Thomas A. Smith, visiting attorney for the Plaintiffs, by depositing a true copy thereof in the United States Mail, addressed to him at Senak, Keegan, Gleason, Smith & Michaud, Ltd., 621 S. Plymouth Court, Suite 100, Chicago, IL 60605, his last known address, and

that there are no other non-CM/ECF participants in this matter.

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